

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

SILVER SERVICES GROUP CORP.

and

**Case 22-CA-185684
22-CA-187129
22-CA-188661
22-CA-191729
22-CA-193771**

**LABORERS LOCAL 79, LABORERS
INTERNATIONAL UNION OF NORTH
AMERICA**

**MEMORANDUM ON BEHALF OF RESPONDENT,
SILVER SERVICES GROUP CORP.**

ORANSKY, SCARAGGI & BORG, P.C.

Michael T. Scaraggi, Esq.

TABLE OF CONTENTS

	Page No.
Table of Authorities.....	i
Statement of the Case.....	2-3
Precise is Not the Alter Ego of Silver.....	3-7
Conclusion.....	8
Certificate of Service.....	9

TABLE OF AUTHORITIES

CASE	PAGE NO.
<u>Lihli Fashions Corp.</u> 80 F. 3d at 747.....	5,6
<u>Lihli Fashions Corp.</u> 80 F. 3d at 748.....	5,6
<u>Local One, Amalgamated Lithographers of Am. v. Stearns & Beale, Inc.</u> , 812F. 2d 763,772 (2 nd Cir. 1987).	5
<u>McCarthy Construction Co.</u> 355 NLRB 50, 52 (2010),.....	7
<u>Murray v. Miner</u> , 4 F 3d 402, 404 (2d Cir. 1996).....	5
<u>Newspaper Guild of NY v. NLRB</u> , 261 F. 3d 291, 294 (2d Cir. 2001).....	5
<u>NLRB v. Al Bryant Inc.</u> , 711 F 2d (3rd Cir. 1983).	4
<u>NLRB v. Don Burgess Construction Corp.</u> , 596 F 2d 378 (9 th Cir 1979).....	5
<u>NY State Teamsters Conference Pens. & Ret Fund v. Express Servs., Inc.</u> , 426 F. 3d 640, 649 (2d Cir. 2005).....	5
<u>Plumbers, Pipefitters and Apprentices Local Union No. 112 Pension, Health and Educational and Apprenticeship Plans v. Mauro's Plumbing, Heating and Fire Suppression, Inc.</u> ("Mauro's Plumbing"), 84 F. Supp. 2d 344, 349 (N.D.N.Y. 2000).....	5
<u>Radio Union v. Broadcast Service Mobile</u> , 380 255 U.S. 255 (1965).....	4
<u>South Prairie Constr. V. Local No. 627, Intern. Union of Operating Eng'rs, AFL-CIO</u> , 425 US 800, 802-803 (1976).....	6
<u>Stardyne Inc. NLRB</u> 41 F2d 141 (3 rd Cir 1994).....	4
<u>United Union of Roofers, Waterproofers, Allied Workers, Local No. 210, AFL-CIO v. A.W. Farrell & Son, Inc.</u>	6
<u>US Reinforcing Inc.</u> 35 NLRB 104 (2007).....	7

**NOW COMES COUNSEL FOR RESPONDENT, SILVER SERVICES GROUP CORP.
AND FILES THIS BRIEF WITH THE HONORABLE JEFFREY P. GARDNER,
ADMINISTRATIVE LAW JUDGE, WHO HEARD THIS MATTER ON
MAY 7, 2019 AND MAY 8, 2019.**

I. STATEMENT OF THE CASE

In April of 2017 the Board issued a consolidated complaint against Silver Services (“Silver”) seeking a Gissel Bargaining Order (Tr. Ins. 18-21, pg. 9). Silver requested use of the Board’s ADR program and in February of 2018, Silver, the Union and the Region entered into an informal settlement agreement whereby Silver agreed to recognize and bargain in good faith with the Union. (Tr. Ins. 20-23, pg. 10). The testimony of Ray Heineman, an attorney with the law firm Kroll, Heineman & Carton and attorney for Laborers’ Local 79, Laborers’ International Union of North America (Local 79) indicates that negotiating dates had been scheduled for June 26, 2019 (Tr. Ins. 22-25, pg. 31; ln. 1-3, pg. 32), August 23, 2018 (Tr. ln. 25, pg. 39), September 14, 2018 (Tr. Ins. 3-4, pg. 49), and September 28, 2018 (Tr. Ins. 22-23, pg. 54). Notwithstanding the negotiation dates, meeting between the parties and their representatives, limited exchange of information, no agreement was reached.

Eugene Errico was called as a witness by General Counsel and he testified he previously worked for Silver, but had no ownership interest in Silver and handled payroll as controller (Tr. Ins. 2-6, pg. 74). Errico testified he was the President and 100% owner of Precise Services Corp. (“Precise”) (Tr. Ins. 13-14, pg. 76). Silver is located at 340 South River Street and has a yard. Precise is located at 411 Hackensack Avenue, Suite 200 which is an office building and has no yard (Tr. Ins. 8-25, pg. 78).

Errico testified he borrowed money from D’Amato on more than one occasion which was used in connection with his Precise business (Tr. Ins. 14-17, pg. 89). He also testified there was no formal loan agreement and was based on a handshake and agreement that Precise would employ D’Amato when it began work (Tr. Ins. 23-25, pg. 90; Ins. 1-2, pg. 91). The moneys from D’Amato came from him personally not from Silver (Tr. Ins. 17, pg. 112).

The moneys would be deposited by personal check of D’Amato to the personal account of Errico not Precise (Tr. Ins. 21-23, pg. 113). Checks from D’Amato were written to Errico because D’Amato felt he had no connection to Precise (Tr. Ins. 1-3, pg. 116).

Any vehicles such as vans which were transferred from Silver to Precise were paid for based upon fair market value and checks were issued by Precise to Silver (Tr. Ins. 1-24, pg. 144).

D'Amato was called as a witness by General Counsel and testified he was employed as a supervisor for Precise to check jobs (Tr. Ins. 1-5, pg. 180). He started working for Precise because he has issues with his health related to cancer and closed Silver in January/February 2018 (Tr. Ins. 13-25, pg. 181).

II. PRECISE IS NOT THE ALTER EGO OF SILVER

Precise is not the alter ego or successor to Silver. Typically an employer who is obligated by the higher costs associated with a union CBA and associated labor costs will consider setting up a “double-breasted” or “dual shop” entity in order to win more bids. In this case neither Silver nor Precise are bound under any union CBA, notwithstanding the fact that Silver is under a bargaining order but has not successfully negotiated a CBA with the union. Precise is under no such bargaining order and Silver has met with Local 79 and its representatives on four (4) occasions.

A double-breasted firm maintains two separate and distinct entities. One entity will be signatory to a CBA and the other entity is not signatory to a CBA. This is not the scenario with Silver and Precise. Neither entity is signatory to a CBA.

While the Act does not expressly prohibit double-breasted operations it does prohibit an employer from interfering with employees' collective bargaining rights and/or refusing to collectively bargain. Again, such is not the case here. Silver did meet on a number of occasions with the union although not reaching an agreement. Subsequent to meeting with the union Silver announced it would no longer be conducting interior demolition work in New York, primarily in Manhattan, because liability insurance premiums had become prohibitively expensive. There was no affirmative obligation to disclose the existence of Precise to Local 79 or any of its representatives. There was no evidence produced that Silver or D'Amato even knew about Precise during any of the four negotiation meetings. Generally, there are two theories applied by the Board and the courts in making a determination as to whether a contractor has established a valid double-breasted operation – the “single employer” or the “alter ego” theory.

The single employer theory applies in circumstances where two entities concurrently perform the same function and one entity recognizes the union while the other does not. Stardyne Inc. NLRB 41 F2d 141 (3rd Cir 1994). When referencing the facts of the within matter neither Silver nor Precise have a signed CBA with any union. At best Silver is under a bargaining order, has met with the union on four occasions but has not concluded any meetings with a signed CBA. In addition, Silver has announced that it no longer would be performing interior demolition services in New York including its primary geographic location of work in Manhattan. Precise on the other hand is not under a bargaining order, has no obligation to bargain with the union and performs interior demolition only in New Jersey although it agreed to complete several Silver jobs in Manhattan. For General Counsel to argue that Precise was established to evade any responsibility under the Act is without merit and only circumstantial. There is no evidence that was produced by General Counsel which indicated any malice or intent to evade the Act. It is evident that general counsel's argument centers around the several advances of sums of money to Eugene Errico personally with little or no documentation. The propriety of those cash advances characterized as loans may be questioned because of their informality but that is not a basis to satisfy an alter ego type argument. The advances on money were personal.

It is generally argued that the Board uses four basic criteria to determine whether entities are legitimately separate or whether they are actually a single employer:

- (a) inter-relation of operations;
- (b) centralized control of labor relations;
- (c) common management;
- (d) common ownership or financial control , Radio Union v. Broadcast Service Mobile, 380 255 U.S. 255 (1965).

It is understood that while no one of the foregoing four factors is considered controlling the Board has stressed the importance of the first three factors which may be argued would tend to show operation integration and in particular centralized control of labor relation. NLRB v. Al Bryant Inc., 711 F 2d (3rd Cir. 1983). Viewing the facts of this case general counsel had not offered evidence or testimony which established any of the first three criteria. Again, to argue that the cash advances made by D'Amato personally to Errico personally may be unwise,

imprudent, even careless but they do not support an argument for common ownership or financial control for which no proof has been advanced.

The record is void of any evidence which supports a common ownership argument and even if made, such assertion will not carry the burden because both the Board and the court have held that common ownership alone is not dispositive. Even if the single employer test's factors are satisfied, the Board must determine whether the employees of both entities share common skills, duties and working conditions. *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir 1979).

The alter ego doctrine is “designed to defeat attempts to avoid a company’s union obligations through a sham transaction or technical change in operations.” *Local One, Amalgamated Lithographers of Am. v. Stearns & Beale, Inc.*, 812 F.2d 763,772 (2nd Cir. 1987). If entities are determined to be alter egos of each other, “then each is bound by the collective bargaining agreements signed by the other, ‘and ‘thereby obligated to honor the pension [and welfare benefit] contributions terms’ of the agreement.” *Plumbers, Pipefitters and Apprentices Local Union No. 112 Pension, Health and Educational and Apprenticeship Plans v. Mauro’s Plumbing, Heating and Fire Suppression, Inc.* (“Mauro’s Plumbing”), 84 F. Supp. 2d 344, 349 (N.D.N.Y. 2000) (quoting *Lihli Fashions Corp., Inc. v. NLRB* 80 F.3d 743, 748 (2d Cir. 1996)). To determine whether two companies are alter egos, courts “focus[] on commonality of (i) management, (ii) business purpose, (iii) operations, (iv) equipment,(v) customers, and (vi) supervision and ownership” between the subject entities. *NY State Teamsters Conference Pens. & Ret Fund v. Express Servs., Inc.*, 426 F.3d 640, 649 (2d Cir. 2005), (quoting *Newspaper Guild of NY v. NLRB*, 261 F.3d 291, 294 (2d Cir. 2001)); see also *Local One Amalgamated Lithographers of Am.*, 812 F.2d at 772. It is clear from the record that neither Silver nor Precise are bound by any CBA.

The NLRB has also developed the single employer doctrine, “which treats two nominally independent enterprises as a single employer, in order to protect the collective bargaining rights of employees.” *Murray v. Miner*, 4 F.3d 402, 404 (2d Cir. 1996). An entity that has signed a CBA and one that has not will be held jointly and severally liable for the signatory’s obligation under the CBA if the single employer test is satisfied and the two entities “together [] represent an appropriate employee bargaining unit.” *Lihli Fashions Corp.* 80 F.3d at 747.

The alter ego and single employer doctrines “are ‘conceptually distinct.’ The focus of the alter ego doctrine, unlike that of the single employer doctrine, is on ‘the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.’” *Lihli Fashions Corp.*, 80 F. 3d at 748. The single employer doctrine, in contrast, focuses on determining if the entities “are part of a single integrated enterprise” and is “characterized by absence of an arm’s length relationship found among unintegrated companies.” *Id.* At 747 (internal quotation marks omitted).

Whether two entities constitute a “single employer” is determined by four factors enumerated by the Supreme Court: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *United Union of Roofers, Waterproofers, Allied Workers, Local No. 210, AFL-CIO v. A.W. Farrell & Son, Inc.* (“*United Union of Roofers*”), 2012 WL 4092598, at *9 (WDNY Sept. 10, 2012) (citing *Radio & Television Broad. Technicians Local Union 1264 v. Broad Serv. of Mobile, Inc.*, 380 US 255, 256 (1965) (per curiam)). See also *South Prairie Constr. V. Local No. 627, Intern. Union of Operating Eng’rs, AFL-CIO*, 425 US 800, 802-803 (1976) (per curiam)). The Second Circuit has held that two additional factors are properly considered as well: (5) use of common office facilities and equipment and (6) family connections between or among the various enterprises. *United Union of Roofers, Waterproofers, and Allied Workers Local No. 210, ALF-CIO v. A.W. Farrell & Son, Inc.* (“*A.W. Farrell & Son, Inc.*”), 547 Fed Appx. 17, 19 (2d Cir. 2013) (quoting *Lihli Fashions Corp.*, 80 F3d at 747. Again here the record is clear there are no common facilities or equipment and there are no family connections.

Precise and Silver do not conduct business at the same physical location. Precise and Silver do not use the same bank accounts. Precise has a separate and different telephone number. Ciro D’Amato, the sole shareholder of Silver does not maintain office space at the Precise business office, he does not share use of the Precise offices and there was no testimony or evidence that D’Amato is provided with any of Precise’s office equipment or use of computer services. No evidence was introduced to show any type of family relationship between Ciro D’Amato of Silver and Eugene Errico of Precise. No evidence was introduced that Precise paid any of Silver’s or D’Amato’s bills either business or personal. There was no evidence of common management, financial control, common ownership or centralized control of labor relations.

When General Counsel alleges that an entity is the alter ego of another company as is alleged here with respect to Silver and Precise and subject to the letter's legal and contractual obligations under a collective bargaining agreement, the General Counsel has the burden of establishing that status. US Reinforcing Inc. 35 NLRB 104 (2007). The determination of alter ego status is a question of fact for the Board to be resolved by an examination of all relevant facts and attendant circumstances.

The Board generally will find an alter ego relationship when the two entities have substantially identical ownership – of which there has been no proof here, identical management- again no proof here, business purpose, operations, equipment, customers and supervision. Not all of these indicators need be present, and no one of them is a prerequisite to a finding of alter ego relationship. While unlawful motivation is not a necessary element of an alter ego finding, the Board will consider whether the purpose behind the creation of the alleged alter ego was to evade responsibilities under the Act. McCarthy Construction Co. 355 NLRB 50, 52 (2010), adopted in 355 NLRB (2010); US Reinforcing, Inc. supra. Respondents herein, Silver and Precise deny they have identical management, operations, equipment and ownership. Precise obtains the jobs, mans the jobs while Silver trucks the debris and disposes of the debris and bills separately for those services. Respondent Precise denies that Precise was established for the purpose of aiding Silver in evading any of its responsibilities under the Act to bargain with Laborers Local 79. Silver informed the Board that it was no longer going to continue interior demolition work in New York at the close of 2018 as the result of the substantial increase in liability insurance premiums.

There is no proof that there was any attempt to conceal or disguise the creation of Precise. General Counsel has presented a case which was more attuned to compliance but not sufficient to support an alter ego theory. The presentation can be best characterized as circumstantial.

III. CONCLUSION

The evidence submitted by General Counsel does not support a finding that Precise Services is the alter ego of Silver Services Group Corp. It appears that the thrust of General Counsel's Complaint and evidence was focused on the issue of compliance. The evidence submitted is insufficient to support a finding of alter ego.

For the foregoing reasons the Complaint should be dismissed.

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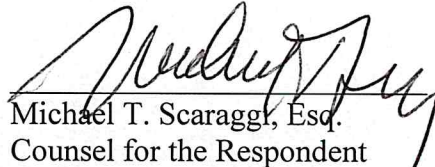
DATE: June 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of Memorandum on Behalf of Respondent, Silver Services Group, Corp., Consolidated Case No. 22- CA- 185684, was served via NLRB electronic filing and email this 12th day of June 2019 on the following:

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June 12, 2019